The Indiana Prosecutor

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Happy Holidays!

Administrative Rule 9 Prosecutor's Duty to Redact

Recent amendments to Administrative Rule 9, effective January 1, 2005, say that certain information heretofore routinely filed in Indiana courts is from that date forward deemed confidential. That means prosecutors will now be required to review documents submitted to them by police and other agencies and prepare pleadings to be filed with the court to insure that any confidential information contained therein remains confidential.

In addition to the amendments to Administrative Rule 9, the Supreme Court also amended Rules 3 and 5 of the Rules of Trial Procedure to provide for the method by which this confidential information is to be filed with the trial court. Trial Rule 3.1 (D) now provides that "any appearance form information, or record defined as not accessible to the public pursuant to Administrative Rule 9(G)(1) shall be filed in a manner required by Trial Rule 5."

Trial Rule 5(G) says that "[e]very document prepared by a lawyer or party for filing in a case shall separately identify information excluded from public access pursuant to Administrative Rule 9(G)...." That Rule makes clear that it is the responsibility of the lawyers or the parties to the action to prepare pleadings in such as way as to protect the confidentiality of information the Supreme Court has deemed confidential. (G)(1) of Trial Rule 5 specifies that when "whole documents ...are excluded from public access pursuant to Administrative Rule 9(G)(1) the entire document shall be tendered on light green paper, marked 'Not for Public Access.'"

When only a portion of a document contains information excluded from public access under amended Administrative Rule 9, Trial Rule 5(G)(2) requires that "said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked 'Not for Public Access' and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains."

It is clear from a reading of the amended rules that it is the prosecutor who must prepare such "green paper documents" tendered by his or her office for filing with the court. It is IPAC's position that this is not a responsibility that can be passed through to police agencies submitting case reports and other paper work to the prosecutor's office.

Inside this Issue

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- **Permissible Sentence After Probation Revocation**

Stephens v. State, ___ N.E.2d ___ **(Ind. 12/10/04)** When Travis Stephens was originally sentenced upon his plea of guilty to Class B Felony Child Molest, he was ordered to serve ten years at the Department of Correction with four years suspended to probation. After serving the executed portion of his sentence in prison, and while on probation, Stephens violated the terms of his probation. The trial court revoked Stephens' probation and ordered him to serve three years of his earlier suspended four year sentence.

Earlier this year, the Court of Appeals held that imposition of less than the total of the defendant's suspended sentence was improper. The Court of Appeals said that when a trial court revokes probation, it is required to order the defendant to serve the entire sentence originally suspended.

The Supreme Court granted transfer in Stephens' case, and on December 12 the high court reversed the Court of Appeals and affirmed the trial court's post-probation-revocation sentence. At issue before the Supreme Court was the authority of a trial court to order a defendant to serve less than the entire amount of a previously suspended sentence after a revocation of probation.

The Supreme Court found that Indiana's statutory probation revocation scheme is sufficiently flexible to permit a trial court to order a defendant to serve all or a portion of the previously suspended sentence following a violation of probation. So long as the post-revocation sentence and the executed time previously ordered is not less than the statutory minimum of the crime charged, the sentence is deemed proper, the Supreme Court said..

The three year term imposed upon revocation of the defendant's probation, when combined with the six year term previously imposed and satisfied, was greater than the statutory minimum for a Class B Felony. Therefore, the trial court had the authority to order execution of three years of Stephens' previously suspended sentence, the Supreme Court said.

- **Indiana Supreme Court Grants Transfer in Excited Utterance Cases**

On Thursday, December 9, the Indiana Supreme Court heard oral argument on two excited utterance cases earlier decided by the Court of Appeals. One of the issues raised on appeal in each of those cases was whether *Crawford v. Washington* precludes the admission of the testimony of a police officer regarding an excited utterance made to him when the declarant of that utterance was unavailable and does not testify at trial. Following argument, the Supreme Court granted transfer in *Hammon v. State,* and *Fowler v. State.*

In *Crawford v. Washington*, the U.S. Supreme Court decided earlier this year that when the prosecution seeks to introduce a "testimonial" out-of-court statement of a person who does not testify at trial, the Confrontation Clause of the 6th Amendment requires that the State show that the declarant is unavailable to testify AND that the defendant had an earlier opportunity to cross-examine the declarant regarding that statement. Unfortunately, the Supreme Court did not include a comprehensive definition of "testimonial" in the *Crawford* decision. Included in the list of examples of testimonial statements, however were "police interrogations".

In both *Hammon* and *Fowler,* the Indiana Court of Appeals distinguished police interrogation from police questioning. In each of these cases, the statements of the now unavailable witness were statements made soon after a startling event had occurred in response to "police questioning." The Court of Appeals held that when police arrive at the scene of an incident in response to a request for assistance and begin immediately to informally question those nearby in order to determine what happened, statements in response to those questions are not testimonial. The Court even went so far as to say in *Fowler* that "an excited utterance is such that it would be difficult to perceive how such a statement could ever be testimonial."

Deputy Attorney General Cindy Ploughe argued *Hammon* and *Fowler* before the Indiana Supreme Court. Ploughe said that the Court's questions focused on two issues. First, the Court questioned whether, in fact, the statements made in the two cases were excited utterances. Secondly, if the statements made were excited utterances, the Court questioned further whether those statements were "testimonial". The cases have been taken under submission by the Supreme Court. Transfer renders the Court of Appeals opinions in these two cases void.